IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12/03/2004

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

W.P. No. 2322 of 2004
and
W.P.M.P. No. 2626 of 2004

V. Krishnamurthy
Proprietor
Meena Advertisers
Old No.142, Eldams Road
Teynampet
Chennai 600 018 ... Petitioner

-Vs-

1. Airports Authority of India
rep. by its Chairman
Rajiv Gandhi Bhavan
Safdarjung Airport
New Delhi - 110 003

2. Executive Director (Commercial)
Rajiv Gandhi Bhavan
Safdarjung Airport
New Delhi - 110 003

3. T.D.I. International India Ltd
rep. by its Managing Director
B-4/62, Safdarjung Enclave
New Delhi - 110 029 ...Respondents

Petition under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus as stated therein.

For Petitioner : Mr. G. Rajagopalan, Senior Counsel
for Miss. P. Rose Kamalam

For Respondents : Mr. Vijaynarayanan for RR1 and 2
Mr. K.S. Natarajan for R3

:ORDER

The petitioner has come forward with this writ petition praying for a

Writ of Certiorarified Mandamus to call for the records relating to the notice inviting tender for licensing indoor and outdoor advertisement sites at International and Domestic Airports, issued by the first respondent published in Hindu dated 30-01-2004 and quash the same and direct the respondents 1 and 2 to invite separate tenders for each airport including Chennai, Madurai, Trichy, Coimbatore and Jaipur Airports.

2. By consent of counsel for both sides, the writ petition itself is taken up for final disposal.

3. The petitioner is in the business of advertisement for the past 2

5 years and his annual turnover is Rs.2 crores and he is an existing licencee for exhibiting advertisement signs in Jaipur, Madras and Mangalore Airports. The first respondent herein called for tenders separately for each airports for licensing of indoor and outdoor advertisements hitherto. The third respondent herein is a licencee for Trivandrum, Bangalore and Hydrabad. The first respondent has issued a notification in newspapers on 27-11-2003 inviting tenders for indoor and outdoor advertisements. In the said notification, they have divided all the airports into four groups. In the said notification, it is provided that minimum of three years experience in advertisement and display business at Transportation centres and having a minimum annual turn over of Rs.25 crores from such advertisement business. The said notification was cancelled by an intimation dated 26-12-2003 published in 'The Hindu' daily. Another notification dated 30-01-200 4 was issued by the first respondent, which was also published in newspaper. In the said notification, it is prescribed that persons having minimum of three years experience in advertisement and display business at Airports, Seaports, Railways as a whole, bus terminals, bus shelters and public places and having a minimum four months prescribed Minimum Reserved Licence Fee, hereinafter referred to as "MRLF" are eligible. The explanation to the words 'experience' and 'turn over' also made in the said notification. Experience means experience from the above advertisement business during the last ten years from the date of publication of the notice inviting publication. Turnover means turnover from advertisement business during the last completed financial year, where the business is running currently and turnover from advertisement business for any of the year where the experience has been claimed during the previous years. The turnover prescribed for Delhi Group is Rs.1,274.88 lakhs; Mumbai Group Rs.2,900.28 lakhs; Kolkatta Group 960.48 lakhs and Chennai group is Rs.582.72 lakhs. Unless a person has annual turnover of the above amount, not eligible to participate in the tender.

4. It is submitted by the respondents 1 and 2 is that the writ petition is not maintainable either in law or on facts. The terms and conditions of the tender notification cannot be challenged, which is in the realm of contract. The Ministry of Civil Aviation has advised grouping of airports so that the bids of smaller airports are clubbed and finalised with bigger airports. It was found that persons responding to notice inviting tender for smallar bids are all persons who do not have requisite experience and financial soundness to bring in quality advertisements, which has resulted

in signing of contract with persons who would bring in international quality of advertisement since they possess requisite financial background and capable of investing in hoarding advertisement having high quality. Taking into account of the above facts, the Civil Aviation advised the Airports Authority of India for clubbing of airports so that one or two big airports would be clubbed with smaller airports which would make it possible for the intending bidders to bid for the entire group as a whole. In case, the contractor tries to withdraw from single airport in the group, the entire group is liable for cancellation. Accordingly, tender notification was issued on 27-11-2003 dividing the airports into four groups. Subsequently, it was found that there were some anomalies in the tender condition, hence it was cancelled. It was also found that minimum annual turnover of Rs.25 crores for the different groups with the revenue prescribed for each group was different also appeared tpo be anomalous and the same was cancelled. The commercial advisory board also recommended to the Board of Airports Authority of India for modification of the commercial manual. Airports Authority of India, in its 73rd Board meeting held on 07-02-2004 effected necessary modification in the commercial manual. On the basis of the amended commercial manual, fresh tender was invited on 30-01-2004 clubbing of airports and widening the scope of experience and to include advertisement in public place also from persons having a minimum of 1 2 months of prescribed MRLF as a turnover. The Airports Authority of India is the highest policy making authority. As far as the respondents 1 and 2 are concerned, on commercial consideration and for maximum revenue realisation, they have grouped the airports and fixed MRLF as such the same cannot be questioned under Article 226 of The Constitution of India.

5. The case of the third respondent is that he is a leader in airport advertising and received various awards from the first respondent. As regards CBI enquiry, it is stated that the same will not entitle it from participating in the tender. According to the third respondent, grouping is not done for the first time. During 1997, Airports of different commercial values such as Chennai, Kolkatta, Delhi are clubbed together, while Trivandrum was clubbed with Mumbai Airport and the petitioner himself had participated in those tenders. The respondents 1 and 2 are well justified in stipulating their own terms and conditions while giving right of advertisement in the airports and it is for the respondents 1 and 2 to fix terms and conditions and eligibility criteria and it is not open to the petitioner to dictate as to what should be the eligibility criteria. Hence, the allegations of violation of Article 14 and 19 (1) (g) is unsustainable in Law. The petitioner has not made out a prima facie case for interference and the tender process cannot be interfered with at the threshold.

6. Mr. Rajagopalan, learned Senior counsel for the petitioner submitted that the impugned notification, grouping various airports into four groups without reference to the commercial potential and other aspects is arbitrary and violation of Article 14 of the Constitution. The minimum reserve price for each airport in a group substantially varies. The annual turnover of Rs.12 months equivalent minimum reserve price is highly arbitrary and unreasonable and it was fixed only to the advantage of the third respondent and to shut out the other operators and new entrants, which amount to undue favouritism and denial of equality of opportunity. The third

respondent is facing CBI enquiry and the conditions were prescribed only to suit the requirements of third respondent, hence the notification suffers from vice of malafides. It is the duty of the State to see that material resources of the community are equally distributed and the wealth does not concentrate in the hands of a single person, and the respondents 1 and 2 have grossly failed in not following the said principles enshrined under Article 3 (g) of the Constitution of India. The conditions incorporated in the notification are tailor made to suit the requirements of the third respondent.

7. The learned Senior counsel appearing for the petitioner relied on the following decisions in support of his case:-

i) (Rashbihari Panda v. State of Orissa) AIR 1969 SC 1081 wherein in para No.17 it was held thus.

17. Validity of the schemes adopted by the Government of Orissa for sale of Kendu leaves must be adjudged in the light of Article 19 (1)( g) and Article 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase Kendu leaves for the year 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government is not of any significance. From the affidavit filed by the State Government it appears that the price fetched at public auctions before and after January, 1968, were much higher than the prices at which Kendu leaves were offered to the old contractors...."

In the above case, the Honourable Supreme Court held that the Government of Orissa invited tenders for advance purchase only from the purchasers of Orissa kendu leaves during the previous year, who had carried out the obligation to the satisfaction of the Government in performance of open competition. The Honourable Supreme Court held that action of the Government was violative of Articles 14 and 19 of the Constitution of India.

ii) Secretary, Haryana State Electricity Board v. Suresh, AIR 1999

Supreme Court 1160 in which in para Nos. 1, 3, 17 and 18, it was held thus:-

1. The doctrine of equality as enshrined in the Constitution promised an egalitarian society and the Contract Labour (Regulation & Abolition) Act, 1970 is the resultant effect of such a constitutional mandate having its due focus in that perspective. This Court in Minerva's Mills case AIR 1980 SC 1789 in no uncertain terms laid down that the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at the inequalities arising on account of vast social and economic differentiation and is thus consequently an essential ingredient of social and economic justice. In short, this Court has equated the security clause in the Constitution so as to mean that the

people of the country ought to be secured of socio-economic justice by way of a fusion of Fundamental Rights and Directive Principles of State Policy.....

3. Ours is a Socialist State as the Preamble depicts and the aim of socialism, therefore, ought to be to distribute the common richness and the wealth of the country in such a way so as to subserve the need and the requirement of the common man. Article 39 is a pointer in that direction. Each clause under the article specifically fixes a certain social and economic goal so as to expand the horizon of benefits to be accrued to the general public at large. In particular reference to Article 39(a) it is seen that the State ought to direct its policies in such a manner so that the citizens - men and women equally, have the right of an adequate means of livelihood and it is in this perspective again that the enactment in the statute-book as noticed above [the Contract Labour (Regulation & Abolition) Act, 1970] ought to be read and interpreted so that social and economic justice may be achieved and the constitutional directive be given a full play.

17. Needless to note at this juncture that the Contract Labour ( Regulation and Abolition) Act being a beneficial piece of legislation as engrafted in the statute-book, ought to receive the widest possible interpretation in regard to the words used and unless words are taken to their maximum amplitude, it would be a violent injustice to the framers of the law. As a matter of fact the law is well settled by this Court and we need not dilate much by reason therefor to the effect that the law courts exist for the society and in the event of there being a question posed in the matter of interpretation of a beneficial piece of legislation, question of interpreting the same with a narrow pedantic approach would not be justified. On the contrary, the widest possible meaning and amplitude ought to be offered to the expressions used as otherwise the entire legislation would lose its efficacy and contract labour would be left at the mercy of the intermediary.

18. As noticed above the draconian concept of law is no longer available for the purpose of interpreting a social and beneficial piece of legislation specially on the wake of the new millennium. The democratic polity ought to survive with full vigour: socialist status as enshrined in the Constitution ought to be given its full play and it is in this perspective the question arises  is it permissible in the new millennium to decry the cry of the labour force desirous of absorption after working for more than 240 days in an establishment and having their workings supervised and administered by an agency within the meaning of Article 12 of the Constitution  the answer cannot possibly be in the affirmative  the law courts exist for the society and in the event law courts feel the requirement in accordance with principles of justice, equity and good conscience, the law courts ought to rise up to the occasion to meet and redress the expectation of the people. The expression regulation cannot possibly be read as contra public interest but in the interest of the public.

In this case, the Honourable Supreme Court held that Article 14 of the Constitution of India is intended to secure socio-economic justice to the people. The Courts are duty bound to give shape and offer to socialistic concept. Equality clause in the constitution does not speak of mere formal

equality before the laws, but embodies the concept of real and substantive equality which strikes at the inequalities arising on account of vast social and economical differentiation and is thus consequently an essential ingredient of social and economic justice.

iii) (Indra Sawhney etc., Vs. Union of India and others) AIR 1993 Supreme Court 477 wherein in 4 and 5 it was held thus;-

"4. The doctrine of equality has many facets. It is a dynamic and an evolving concept. Its main facets, relevant to Indian society, have been referred to in the preamble and the articles under the subheading "Right to Equality" - (Articles 14 to 18). In short, the goal is 'equality of status and of opportunity.' Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of several articles in Part IV (Directive Principles of State Policy). "Justice, Social, Economical and Political", is the sum total of the aspirations incorporated in Part IV.

5. Article 14 enjoins upon the state not to deny to any person " equality before the law" or "the equal protection of the laws", within the territory of India. Most constitutions speak of either " Equality before the laws" or "the equal protection of the laws", but very few of both..... The content of the expression "Equality before the laws" is illustrated not only by Articles 15 to 18 but also by the several articles in Part IV, in particular, Articles 38, 39, 39A, 41 and 46. Among others, the concept of equality before the law contemplates minimising the inequalities in income and eliminating the inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interests of the weaker sections of the people, including in particular the scheduled castes and scheduled tribes and to protect them from social injustice and all forms of exploitation. Indeed, in a society where equality of status and opportunity do not obtain and where there are glaring inequalities in incomes, there is no room for equality, either equality before law or equality in other respects."

In this case, the Honourable Supreme Court held that Articles 14 and 18 are to be understood in the light of Articles contained in Part IV of the Constitution (Per. B.P. Jeevan Reddy, J) for himself and on behalf of N.H. Kania, C.J., M.L. Venkatachaliah, J, A.H. Ahmadi, J). Article 14 enjoins upon the state not to deny to any person " equality before the law" or "the equal protection of the laws", within the territory of India. The concept of expression equality before Law is illustrated not only by Articles 15 to 18, but also by the several articles in Part IV, in particular Articles 38, 39A, 41 and 46. In a society where equality of status and opportunities do not obtain and where there are glaring inequalities in income, there is no room for equality. Either equality before Law or equality in interest.

8. Mr. Vijay Narayanan, learned counsel appearing for the respondents 1 and 2 submitted that as per the advise of the Ministry of Civil

Aviation, smaller airports are clubbed together. On the basis of past experience, the persons responding to the invitation of the tender pertaining to smaller airports did not have the requisite experience of financial background to bring in quality advertisement into the smaller airports, with the result, the potential for the smaller airports could not be properly utilised. Whereas,t he larger airports resulted in bringing international quality of advertisement, because the participants possess rich experience and financial background. The matter was discussed in detail by the Commercial Advisor Board by the Airports Authority, which has agreed to the suggestion of the Civil Aviation Department. Some anomalies were found in commercial manual which was also amended on the 73rd Board meeting held on 07-01-2004. Thereafter, the impugned notification was issued clubbing of airports and widening the scope of experience to include advertisement in public places also. The tenderers are requested to quote for each and every individual airport as indicated in each group. The tenderers must quote licence fee for each airport in respective group, correct value of the quoted licence fee for the whole group establish the basis to select the highest bidder. After award of contract for group of airports, in the event of a party not complying with the contractual obligations in respect of even one airport, the party shall be debarred from participation in AAIs tenders anywhere in India for a period of three years. The licence fee payable by the tenderers shall not be less than the minimum fee prescribed by the Airports Authority of India for respective airports in the tender documents. All the essential factors and criteria have been taken into account before deciding on the grouping of airports and there is no arbitrariness in the grouping. The grouping of different airports into a single group is offending Article 14 of the Constitution is unsustainable. The question of violation of Article 14 of the Constitution would not arise since different airports would have different revenue potential have been put into a particular group to realise maximum revenue for the group as a whole by including the smaller airports. If the person having lesser turnover are allowed to participate in the tender, interest of the Airport will be highly prejudiced. It is also canvassed by the learned counsel that fixation of conditions and eligibility criteria are well within the realm of the authorities and it cannot be questioned by the petitioner under Article 226 of the Constitution of India. The learned counsel also denied that the impugned notification is violative of Article 14, 19 (1) (g) and 39 (b) of the Constitution in any manner and prayed for dismissal of the writ petition.

9. Mr. Vijay Narayanan, learned counsel appearing for the respondents 1 and 2 relied on the following decisions:-

i) G.B. Mahajan v. Jalgaon Municipal Council, (1991) 3 SCC 91 wherein in Para Nos. 22, 26, 38, 39, 40, 45 and 46, it was held thus:-

22. ...The criticism of the project being 'unconventional' does not add to or advance the legal contention any further. The question is not whether it is unconventional by the standard of the extant practices, but whether there was something in the law rendering it impermissible. There is, no doubt, a degree of public accountability in all governmental enterprises. But, the present question is one of the extent and scope of judicial review over such matters. With the expansion of the State's presence in the field of

trade and commerce and of the range of economic and commercial enterprises of government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against time scales, quality control, costbenefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are bona fide and within the limits of authority.
26. In the ever increasing tempo of urban life and the emerging stresses and strains of planning, wide range of policy options not inconsistent with the objectives of the statute should be held permissible. Referring to the "Role of the Judge in Public Law Litigation" a learned author says:

"Administrative law is, in essence, a search for a theory of how public policy should be made. Two powerful traditions mark the boundaries of that search. On one side, we leave the choice among competing values to a largely unstructured process of pulling and hauling by individuals directly accountable to the citizenry. On the other side, we demand a highly structured process of party-controlled proof and argument before a neutral arbiter to resolve disputes over the application of rules to specific facts. Between these extremes is that vast landscape we call policy making - the reconciliation and elaboration of lofty values into operational guidelines for the daily conduct of society's business."

38. In the arguments there is some general misapprehension of the scope of the "reasonableness" test in administrative law. By whose standards of reasonableness that a matter is to be decided? Some phrases which pass from one branch of law to another - as did the expressions 'void' and 'voidable' from private law areas to public law situations - carry over with them meanings that may be inapposite in the changed context. Some such thing has happened to the words " reasonable", " reasonableness" etc. In Tiller v. Atlantic Coast Line Rail Road Company, Justice Frankfurter said:
"A phrase begins life as a literary expression; its felicity leads to its lazy

repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas."

39. Different contexts in which the operation of □reasonableness□ as test of validity operates must be kept distinguished. For instance as the arguments in the present case invoke, the administrative law test of □reasonableness□ as the touchstone of validity of the impugned resolutions is different from the test of the □reasonable man□ familiar to the law of torts, whom English law figuratively identifies as the □man on the Clapham omnibus□. In the latter case the standards of the □reasonable man□, to the extent such a □reasonable

man is court

s creation, is in a manner of saying, a mere transferred epithet. Lord Radcliffe observed: (All ER p. 160)
"By this time, it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself...."
See Davis Contractors Ltd. v. Fareham U.D.C., (1956) 2 All ER 145, 16

0.

40. Yet another area of reasonableness which must be distinguished is the constitutional standards of 'reasonableness' of the restrictions on the fundamental rights of which the court of judicial review is the arbiter.
45. When Lord Denning, M.R. stated in the Court of Appeal that "Not only must (the probationer-Counseller) be given a fair hearing, but the decision itself must be fair and reasonable", the House of Lords thought that the statement of the learned Master of the Rolls, if allowed to pass into law, would wrongly transform the remedy of judicial review, as the statement would imply that the court can itself sit, as in appeal, in judgment of the reasonableness of the decision instead of on the correctness of the "decision making process". "The purpose of judicial review", it was stated: (All ER p. 144)
"... is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

46. While it is true that principles of judicial review apply to the exercise by a government body of its contractual powers, the inherent limitations on the scope of the inquiry are themselves a part of those principles. For instance, in a matter even as between the parties, there must be shown a public law element to the contractual decision before judicial review is invoked. In the present case the material placed before the court falls far short of what the law requires to justify interference.

In this case, the Supreme Court while discussing the applicability of doctrine of legitimate expectation pointed out that it must be founded on sanction of Law. Any claim based on legitimate expectation, without anything more cannot confer a right. The reasonableness on restrictions must be determined from stand point of general public interest. It was also held that the scope of judicial review in the matter relating to policy decision of the Government when it was taken in purported exercise of statutory powers in public interest, acting reasonably and in good faith - held not to be interfered with.

ii) Air India Ltd. v. Cochin International Airport Ltd., (2000)
2 SCC 617 wherein in para-7, it was held thus:-

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India, Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, CCE v. Dunlop India Ltd., Tata Cellular v. Union of India, Ramniklal N. Bhutta v. State of Maharashtra and Raunaq International Ltd. v. I.V.R. Construction Ltd. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny....."
In this case, it is held by the Supreme Court that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. The Supreme Court also cautioned in this case that the State, Corporation are bound to adhere to norms, standards and procedures laid down by them and cannot depart from them arbitrarily. In such a case, though that decision is not amenable to judicial review and the Courts can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness.

iii) (Union of India and another Vs. International Trading & Co., and another) (2003) 5 Supreme Court Cases 437 wherein in Para 19 and 20 , it was held thus:-

"19. In Union of India V. Hindustan Development Corporation, it was observed that decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest where the doctrine of legitimate expectation can be applied. If it is a question of policy, even by ways of change of old policy, the Courts cannot intervene with the decision. In a given case whether there are such facts and circumstance giving rise to legitimate expectation, would primarily be a question of fact."
20. As was observed in Punjab Communications Ltd., Vs. Union of India the change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury reasonableness. The decision-maker has the choice in the balancing of the pros and cons relevant to the change in policy. It is, therefore, clear that the choice of policy is for the decision-maker and not the Court. The legitimate substantive expectation merely permits the Court to find out if the change of policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which is no reasonable person could have made. A claim based on merely legitimate expectation without anything more cannot ipso facto give a right. Its uniqueness lies in the fact that it covers the entire span of time; present, past and future. How significant is the statement that today is tommorrow's yesterday. The present is as we experience it, the past is a present memory and future is a present expectation. For legal purposes,

expectation is not same anticipation. Legitimacy of an expectation can be inferred only if it is founded on the sanction of law."
In this case, it is held by the Apex Court that a mere legitimate expectation without anything more cannot ipso facto give a right. For legal purposes, expectation is not same anticipation. Legitimacy of an expectation can be inferred only if it is founded on the sanction of law."

iv) (Tata Cellular Vs. Union of India) (1994) 6 Supreme Court Cases 651 wherein in para 93 and 94, it was held thus:-

"93. In Union of India V. Hindustan Development Corporation, this Court held thus: (SCC p.515, para 9)
...the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds. In Erusian Equipment & Cemicals Ltd. V. State of West Bengal, this Court observed as under: (SCC p.75, para 17)
"When the Government is trading with the public, the demoractic form of Government demands equality and absence of arbitrariness and discrimination in such transactions". The activities of the Government have a public element,and, therefore, there should be fairness and equality. The State need not enter into any contract, with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure."

94. The principles deducible from the above are:
(1) ...
(2) ...
(3) ...

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasiadministrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by malafides.
(6) ...

In the above case, The Apex Court, following the case in Union of India Vs. Hindustan Development Corporation laid down 6 principles in which 4 and 5 are more appropriate to decide the case on hand. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and the Government must have freedom of contract. In other words, a fair play in the Government decision must not only be decided by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or

actuated by malafides.

10. The learned counsel for the third respondent Mr. K.S. Natarajan submitted that the third respondent is a leader in the Airport Advertisement and merited the various awards from the first respondent and has qualification by way of successfully competing in the open tender bids. As far as CBI enquiry is concerned, the third respondent is extending his full cooperation and in any event it will not debar the third respondent from participating in the tender. The alleged collusion by the third respondent with the respondents 1 and 2 is baseless and the learned counsel termed the said allegation as mischevious. It is also denied by the learned counsel that the petitioner's right has not been infringed or violated in any manner by issuance of the tender notification and prayed for dismissal of the writ petition.

11. Mr. Rajagopalan, learned Senior counsel appearing for the petitioner advanced arguments to the effect that grouping various Airports into group I to IV without reference to the commercial potential and other aspects is unconventional, arbitrary, violative of Article 14 of the Constitution. In support of the said argument, the learned Senior counsel pointed out that minimum reserve price for each Airport in a group substantially varies and therefore grouping different Airports to a single group is untenable. The above said contention was contraverted by Mr. Vijay Narayanan, learned counsel for the respondents 1 and 2 by stating that Ministry of Civil Aviation advised the respondents 1 and 2 that grouping of airports to be considered in such a manner so that the bids for smaller airports are not capable of bringing quality advertisements as they do not possess requisite experience or financial background, with the result potentials of smaller airports not properly utilised. On the other hand, the tenderers for the larger airports could bring international quality of advertisement as they possess requisite financial background and rich experience. It is stated that taking those facts into account, the said advise of Ministry of Civil Aviation was followed and one or two big airports are clubbed with smaller airports thereby making it possible for the intending bidders to bid for the entire group as a whole. One of the conditions in the tender is that if a contractor try to withdraw from any single airport in the group, the contract in respect of the entire group will be cancelled. The rationale behind the grouping is to get quality advertisement of international standards not only in bigger airports and also smaller airports and besides improving revenue from it.

12. Advertisement is a form of communication and the term is broad enough to include a wide range of types from a small two line entry in a newspaper or a magazine to a spread of several full pages or from a small sign in a shop of window to a huge bill board of changing design in coloured lights. To a manufacturer, advertisement is part of a firm's marketing programme and to the retailer, it is a part of a display store programme etc., and to the consumer it is a major source of information regarding products and services.

13. Nowadays, advertisement plays a vital role in all fields. Airports are places of class, status and rank. No doubt, international

quality of advertisement not only promote income to the airport authorities but also promote sales of a commodity and service.

14. Though it is painful that a small contractor, who is capable of participating in the tender in respect of smaller airports is prevented, the expected international quality is absolutely necessary. Airports are being used by international community, hence, I am of the view that grouping is perfectly valid.

15. Equality before Law envisaged in Article 14 is a necessary corollary to the high concept of Rule of law accepted by the constitution. Under Article 19 (1) (g) of the Constitution, a citizen shall have the right to practice any profession, carry on any occupation, trade or business. Article 39 (b) contemplates that State shall, in particular, direct it's policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good. The words 'distributed' used in Article 39 (b) may be broadly construed so that the Court may give full and comprehensive effect to the Statutory intent of Article 39. It include distribution of goods or services throughout a community. The words apportionment, allotment, allocation, classification clearly falls within its scope. Article 39 (b) and (c) have to be integrated with the provisions of Part III and have to be read together to achieve the objective of a welfare State and an egalitarian social order. Article 19 (6) provides that nothing in Article 19 (1) (g) shall prevent the State from carrying on business, trade etc., whether to the exclusion complete or partial of citizens or otherwise. The power to enter into contracts is expressly vested in the State or instrumentalities. No citizen has a fundamental right to insist that Government must enter into contract with him. Similarly, the words ' material resources' used in Article 39 (b) are wide enough to cover not only the natural or physical resources, but also movable and immovable properties. It means, all things which are capable of producing wealth for the community. Under Article 298, executive power of the Union of each State shall extend to carry on any trade of business, acquisition of holding and disposal of property and making a contract for any purpose. Article 298 can be exercised without any legislation or Rules being made so long as it does not contravene any Law.

16. The expansion of the State's presence in the field of Trade and Commerce and the range of minimum and commercial enterprises of Government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, improved management methods, prevention of time and cost overruns in projects, balancing of costs against time scales, quality control, cost-benefit ratios etc., In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitution or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are bonafide and within the limits of authority. In the ever increasing tempo of urban life and the emerging

stresses and strains of planning, wide range of policy options not inconsistent with the objectives of the statute should be held permissible. Followed G.B. Mahajan v. Jalgaon Municipal Council, (1991) 3 SCC 91.

17. The Law relating to award of contract by the State, its Corporation and Bodies acting as instrumentalities and agencies of the Government or private party or by a public body is essentially a commercial transaction. In arriving at a commercial decision, consideration which are paramount are commercial considerations. It is open to the authority to choose its own method to arrive at a decision. It can fix its own terms of invitation to the tender but the State, its Corporation and instrumentalities are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though the decision is not amenable to judicial review, the Courts can examine the decision making process and interfere, if it is found vitiated by malafides, unreasonableness and arbitrariness. It is also the duty of the Court to keep the larger public interest in mind in order to decide whether it's intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest required interference, the Court should interfere. Followed Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617 .

18. The concept of equal treatment in terms of Article 14 of the Constitution of India applies also to matters of Governmental policy or any action of the Government relating to contractual matters. If the contractual matters fail to satisfy the test of reasonableness, it would be unconstitutional. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily vizualised than precisely defined. When the discretion to change the policy in exercise of the executive power untrammelled by any State or Rule can not be labelled as arbitrary. Even State action must be informed by reason and it follows that an act uninformed by reason is arbitrary. Followed (Union of India and another Vs. International Trading & Co., and another) (2003) 5 Supreme Court Cases 4 37.

19. The learned Senior counsel appearing for the petitioner advanced arguments that the conditions stipulated namely turnover of 12 months equivalent of MRLF is highly arbitrary, unreasonable and offends the principles enshrined in the Constitution, besides that it was imposed to suit the third respondent. Indeed, the learned Senior counsel described the said conditions as tailor made.

20. The other condition that persons must possess 12 months prescribed MRLF is stated as onerous and it suits only the third respondent. The decision makers have the choice in the balancing of the pros and cons relevant to the change in policy, hence it is for them to decide and not for the Court. It is stated that condition of 12 months MRLF has been fixed taking into account of number of passengers in a given period. These are essentially matters of economic policy which lack adjudicative disposition.

This is a judicial recognition of administrator's right to trial and error within their limits of authority.

21. The act of the respondents 1 and 2 confined and structured by rational, relevant and non-discriminatory standards and the conditions imposed are reasonable neither affected by bias or actuated by malafides. The averment that CBI enquiry is pending against the third respondent is concerned, it is for the respondents 1 and 2 to accept or reject its tender following the terms of tender conditions or norms or guidelines. No reason is found for interference in the matter.

Hence, writ petition is dismissed. No costs. Connected WPMP is closed.

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Index : Yes
Internet : Yes

To

1. The Chairman
Airports Authority of India
Rajiv Gandhi Bhavan
Safdarjung Airport
New Delhi 110 003

2. Executive Director (Commercial)
Rajiv Gandhi Bhavan
Safdarjung Airport
New Delhi 110 003

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